No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF OREGON
APPELLANT-PETITIONER

v.

THOMAS CAPTAIN
APPELLEE-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO STATE OF OREGON COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

TEAM NO. 51
COUNSEL FOR APPELLEE-RESPONDENT

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QUESTIONS PRESENTED

I. Whether the Cush-Hook Nation retains possession of the land in Kelley Point Park according to the doctrine of aboriginal title.

II. Whether the State of Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the questioned lands notwithstanding its purported ownership by a non-federally recognized American Indian tribe.

STATEMENT OF THE CASE

I. Facts of the Case

A. The Cush-Hook Nation, Aboriginal Title and Improper Land Transfers.

Thomas Captain (Captain), a Cush-Hook citizen, moved to the Cush Hook Nation's aboriginally possessed lands and cut down an archaeologically, culturally, and historically significant tree containing a religious tribal symbol. Currently, however, these lands are encompassed by Oregon State's Kelly Point Park. The State of Oregon obtained these lands through a series of improper land transfers, incorrectly presuming that the Cush-Hook Nation had extinguished any claims of possession to the involved lands. These lands are at the confluence of the Columbia and Willamette Rivers.

Historically, the Cush-Hook Nation occupied and utilized these lands from time immemorial. In April of 1806, William Clark of the Lewis and Clark expedition encountered the Cush-Hooks and documented their traditional ways within his journal, while also mapping the location of their whereabouts. Clark later considered the Nation to be recognized by the United States.

Until 1850, the Nation continued living as it had previously, but then signed a treaty with Superintendent of Indian Affairs for the Oregon Territory, Anson Dart, to relocate 60 miles westward. The Nation relocated, but was never compensated for their lands as promised nor conferred any of the treaty's benefits. The United States Senate never ratified Anson Dart's treaty with the Nation.

The Cush-Hook Nation's relocation was intended to make room for settlers. The Oregon Donation Land Act of 1850 granted 640 acres of land in fee to "every white settler" who "resided upon and cultivated the land for four consecutive years." 9 Stat. 496-500.

The Meek family received lands pursuant to the Act, yet never fulfilled the Act's requirements. Regardless, their descendants sold the land to the State of Oregon in 1880. The State of Oregon then reserved the lands for Kelley Point Park.

B. Public Law 280 and it's applicability on the Cush-Hook Nation's lands.

In 2011, Captain moved into the Kelley Point Park area. The reason that Captain moved into the park was two-fold. The first was to reassert his Nation's ownership of the land. The second was to protect culturally and religiously significant trees that have grown in the park for hundreds of years. Vandals have recently begun to enter Kelley Point Park and either deface the totems or cut them out so that the vandals could sell the sacred totems. Captain stood sentry over the trees because the state of Oregon has done nothing to stop the trees from being defaced and damaged. To save one of the sacred totems that had already been defaced, Captain cut down the tree and removed the sacred totem. Captain was in transit to the Cush-Hook's current location with the sacred totem when he was pulled over by an Oregon State Trooper who arrested him.

The State of Oregon charged Captain with three crimes. The first is trespass on state lands. The second is cutting timber in a state park without a permit. The third is desecrating an archaeological and historical site under Oregon Statutes §§ 358.905-961 and §§ 390.235-240.

II. Procedural History

Captain consented to a bench trial in the Oregon Circuit Court for Multnomah County. The Circuit Court made five conclusions of law. The first is that Congress erred in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States. The second is that the Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States as required by *Johnson v. M'Intosh* because the U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook Nation for its land. The third is that the United States' grant of of fee simple title to the land at issue to Joe and Elsie Meek under the Oregon Donation Land Act was void ab initio and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void. The fourth is that the Cush-Hook Nation owns the land in question under aboriginal title. The fifth is that Oregon Statutes §§ 358.905-961 and § 390.235-240 apply to all lands in the state of Oregon under Public Law 280 whether they are tribally owned or not. Thus, Oregon properly brought criminal action against Captain for damaging an archaeological, cultural, and historical object.

The Circuit Court found that the land in Kelley Point Park still belongs to the Cush-Hook Nation. Captain was found not guilty for trespass on state lands, and cutting timber without a permit. Captain was found guilty for damaging an archaeological site and a cultural and historical artifact. Captain was charged $250.

The State of Oregon and Captain appealed the decision. The Oregon Court of Appeals affirmed the Circuit Court without writing an opinion. The Oregon Supreme Court denied review. The State of Oregon filed a petition and cross petition for certiorari to the Supreme Court. Captain also filed a cross petition for certiorari to the Supreme Court.

The Supreme Court granted Certiorari on two issues. The first is whether the Cush-Hook owns the aboriginal title to the land in Kelley Point Park. The second is whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian Tribe.

ARGUMENT

I. The Cush-Hook Nation retains aboriginal title to the land in Oregon State's Kelley Point Park because the Cush-Hook's claim to aboriginal title was not extinguished making all following land transfer void *ab initio*.

Aboriginal title refers to the exclusive right of the original Indian tribes to utilize and occupy traditionally possessed lands inhabited "from time immemorial" *Mashpee Tribe v. Secretary of Interior,* 820 F.2d 480, 481–82 (1st Cir.1987) (quoting *County of Oneida v. Oneida Indian Nation of N.Y.,* 470 U.S. 226, 234 (1985)). An Indian nation may assert its own aboriginal title by demonstrating "actual, exclusive, and continuous use and occupancy [of the questioned lands] 'for a long time' prior to the loss" of the lands. *The Sac and Fox Tribe of Indians, et al. v. U.S.,* 315 F.2d 896, 903 (Ct. Cl. 1963).

Continually, aboriginal title is a established by the Indian nation's historical connectedness to the lands. Essentially, aboriginal title affords tribal members as "the rightful occupants of the soil, with a legal claim to retain possession of it." *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823). An Indian nation's right of occupancy is "as sacred as sacred as the

fee," *U.S v. Shoshone Tribe of Indians,* 304 U.S. 111, 115 (1938) and shall be "as securely safeguarded as is the fee simple absolute title." *Id.* at 117. *See U.S. v. Santa Fe Pac. R.R. Co.,* 314 U.S. 339, 345 (1941); *Mitchel v. U.S.*, 34 U.S. 711, 745 (1835).

Johnson v. M'Intosh's longstanding policy of the right of use and occupancy has been revisited numerous times within many jurisdictions. This demonstrates a focus upon the importance of tribal relations within the United States. *Worcester v. Georgia*, 31 U.S. 515 (1832); *Mitchel*, 34 U.S. 711; *Chouteau v. Molony*, 57 U.S. 203 (1853); *Buttz v. Northern Pac. R.R.*, 119 U.S. 55 (1886); *Shoshone Tribe*, 304 U.S. 111. Only the United States may interfere with the vested right of Indian nations and more specifically, their rights to use and occupancy of aboriginal lands. *Cramer v. U.S.,* 261 U.S. 219 (1923). Additionally, the tribal right to use and occupy aboriginal lands need not rely "upon a treaty, statute, or other formal government action; it is Congressionally protected. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339.

Aboriginal title is, however, terminable; the sovereign, and only the sovereign, has the ability to extinguish an Indian nation's aboriginal title. *County of Oneida,* 470 U.S. 226, 234. Aboriginal title may be extinguished at any time by the sovereign, or with the sovereign's consent in one of two fashions: (1) by means of physical conquest; or, (2) through valid contracts and/or treaties. *Id.* at 1159. Continually, "'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (quoting *Johnson*, 21 U.S. 543).

Upon successful extinguishment of aboriginal title, the underlying holder to Indian lands – the sovereign – gains exclusive rights to the Indian lands; this is known as the right of

preemption. *Id.* at 574. The powers of extinguishment and preemption generally are combined, but are separate powers. *Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.,* 414 U.S. 661, 667 (1974). Preemption, however, may only occur after extinguishment of aboriginal title is finalized. *Id*.

Accordingly, such lands may be conveyed vis-à-vis transfer; such a transfer may allow third parties fee title control of the conveyed lands. *Mitchel*, 34 U.S. 711. This, however, cannot occur " until Indian title is extinguished by sovereign act, any holder of the fee title or right of preemption, either through discovery or a grant from or succession to the discovering sovereign, remains subject ... to the Indian right of occupancy." *Oneida Indian Nation of N.Y., et al v. State of N.Y., et al,* 691 F.2d 1070, 1075 (2nd Cir. 1982). Essentially, the underlying fee holder – the sovereign - has a future interest in the Indian lands and does not obtain a present interest until aboriginal title has been successfully extinguished; the right of preemption requires extinguishment. *Id*. at 1075.

Historically, and until 1871, dealings with Indian nations were executed through treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Antoine v. Washington*, 420 U.S. 194 (1975). Treaties with Indian tribes are not obligatory until ratified by the President of the United States and the United States Senate. *Bush v. U.S.*, 29 Ct. Cl. 144 (Ct. Cl. 1894). A treaty may only be considered conclusive and binding from the date of its signature. *Id.* at 147. *See also Idaho v. Coffee*, 97 Idaho 905, 556 P.2d 1185 (1976). Additionally, Congressional intent to extinguish aboriginal title must be clear and unambiguous within the wording of the treaty. *Santa Fe*, 314 U.S. 339.

Generally, An unratified treaty has no force until ratified by a two-thirds vote of the Senate. U.S. Const., Art. II, cl. 2; *S.E.C. v. Investment Swiss Invs. Corp*., 895 F.2d 1272,

1275 (9th Cir. 1990). Until extinguishment, the right of occupancy and full usage of aboriginal land may not be questioned. *Winters v. U.S.*, 207 U.S. 564 (1908).

Additionally, treaties with Indian nations must be interpreted as the respective Indian nations would have understood the terms of the treaty. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); Jones *v. Meehan*, 175 U.S. 1 (1899); *U.S. v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (9th Cir. 2010). The Supreme Court has further looked "beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation,* 318 U.S., 432.

Despite a lack of treaty ratification, Indian tribes may receive compensation for their loss of lands. *U.S. v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946). Recognized title need not be demonstrated by Indian nations to receive compensation for involuntary takings involving aboriginal lands. *Id*. Additionally, issues involving compensation for impermissible takings may be alleviated through recognized title – a heightened version of aboriginal titles, though not formal federal recognition. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955). Recognized title, generally speaking, may be created through statutes or treaties; the issue of whether recognized title exists is a question of intent. *Id*. Intent may also be demonstrated "definite intention by congressional action or authority to accord legal rights, not merely permissive occupancy." *Id.* at 278–79. *See also Seneca Nation of Indians v. N.Y.*, 206 F.Supp.2d 448 (W.D. N.Y. 2002).

In this case, the Cush-Hook Nation retains claims to the lands located within present day Kelley Point Park. First, the Cush-Hook Nation's aboriginal title was never extinguished

by the United States because the United States Senate did not ratify Anson Dart's – Superintendent of Indian Affairs for the Oregon Territory – Treaty with the Nation, while failing to compensate the Nation for their land as agreed upon within the 1853 treaty. Second, the grant of fee simple title of the questioned lands to the Meek family under the Oregon Donation Land Act is void because the lands were still in possession of the Cush-Hook Nation and were not public lands.

For the foregoing reasons, the Oregon Court of Appeals correctly held that the Cush-Hook Nation still possessed the lands encompassed by Kelley Point Park. This Court should therefore affirm the decision of the Oregon Court of Appeals.

A. The Cush-Hook Nation possesses aboriginal title to the lands encompassed by Kelley Point State Park because their claim to aboriginal title was never extinguished.

Aboriginal title refers to an Indian nation's right of use and occupancy of their traditional lands. The doctrine itself is far from all encompassing, but affords Tribes a present possessory right to their aboriginal lands. This principle was commented upon in *Johnson v. M'Intosh*, where the Supreme Court considered Indian nations, their rights of use, occupancy and transferability of aboriginal lands, as weighed against the competing interests of the United States and Euro-American settlers. 21 U.S. 543. Writing for the Court, Marshall determined that Indian nations were "the rightful occupants of the soil, with a legal claim to retain possession of it." *Id.* at 574. Though Congressionally protected, aboriginal title is not an absolute doctrine. *Santa Fe*, 314 U.S. 339.

This being said, aboriginal title may be extinguished at any time, but only by the sovereign; title may only be extinguished through conquest or purchases or treaties. *Johnson.* Once extinguished, lands possessed by aboriginal title revert to the federal government in

present fee simple. Once held in present fee simple, the federal government may utilize the lands as desired, but until extinguishment is finalized, the federal government may not infringe upon the Indian nations right to occupancy and use. *Id*. *See also Oneida Nation*, 414 U.S. 661.

To demonstrate unextinguished aboriginal title, this Court must first determine that the Cush-Hook Nation possessed the questioned lands in aboriginal title. Then this Court must find that the 1853 treaty with the Cush-Hook Nation was invalid because it lacked Senate ratification. Subsequently, the resulting land transfers need not be proven invalid because the treaty, while lacking ratification, nullified any land transfers to: (1) the territory of Oregon; (2) the Meek family, and their descendants; and, (3) Oregon State. Legal reasoning lies within the Nonintercourse Act, current 25 U.S.C. § 177. (The Nonintercourse Act was enacted to prevent unfair dealings with Indian nations unless Congressionally consented upon. *See Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039 (5th Cir. 1996).

Here, the Cush-Hook Nation retains aboriginal title to the lands of modern day Kelley Point Park. This Indian nation retains its title for a number of reasons, but most notably, because their claims to aboriginal title were never extinguished. Lacking an express, consensual forfeiture of title – minus conquest, of course – aboriginal title may not be foregone. Additionally, Congress must specifically intend to extinguish aboriginal title; the intent may not be ambiguous and shall be stated in plain language. *Delaware Nation v. Pennsylvania*, 446 F.3rd 410 (3rd Cir. 2006). *See Seneca Nation*, 206 F.Supp.2d 448. Treaties may form the basis for extinguishment of aboriginal title, but treaties must be ratified by the United States Senate to be valid. Additionally, a treaty must be fulfilled in order to fully binding; lacking a valid treaty, Congressional extinguishment of aboriginal

rights may not be supported. Therefore, the Cush-Hook Nation has unextinguished title to its aboriginal lands.

a. The Cush-Hook Nation's aboriginal title persists.

The Cush-Hook Nation's presence upon the questioned lands suggests the sheer basis by which aboriginal title may persist. Discussed in *The Sac and Fox Tribe of Indians*, aboriginal title may be established through "actual, exclusive, and continuous use and occupancy [of the questioned lands] 'for a long time' prior to the loss" of the lands. 161 Ct. Cl. 189, 202. There, the court suggested that the usage need not be perpetual, but instead, continuous during the period of use and occupancy. *Id.*

Here, expert witnesses in a variety of disciplines agreed by finding that the Cush-Hook Nation occupied, used, and owned the lands encompassing modern day Kelley Point State Park before the arrival of Euro-American explorers. This was determined within the lower court's ruling as a finding of fact; generally, aboriginal titles is a question of fact decided through judicial determination. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339. This determination depends upon the nature in which the specific Indian nation lived upon and utilized the lands. *Mitchel*, 34 U.S. 711.

Dating back to April of 1806, and well before the Oregon Donation Land Act of 1850, William Clark of the Lewis and Clark expedition, documented the Cush-Hook Nation within his journal. More specifically, Clark documented the Nation's traditional existence, his interactions with the Nation, and most importantly, the location of the Cush-Hook Nation's settlement. Their settlement was on the confluence of the Columbia and Willamette Rivers, where present day Kelley Point Park is located.

Furthermore, the Cush-Hook Nation retains aboriginal title to the lands encompassing Kelley Point State Park because the United States never extinguished their aboriginal title. *Johnson*, 21 U.S. 543. Absent an express extinguishment of aboriginal title, the sovereign may not singlehandedly eliminate such title. *Santa Fe*, 314 U.S. 339. The Cush-Hook, remained upon their aboriginal lands until 1850, while living according to their traditional beliefs – as Clark documented. Until 1850, aboriginal title remains unquestionable; the Cush-Hook not only demonstrated aboriginal title through their unfettered usage and occupation of the questioned lands, but also through Clark's documentation of their lifestyle, location and traditional ways. Essentially, the Cush-Hook adequately demonstrated their claims aboriginal title. This Court should affirm the appellate court's finding of unextinguished aboriginal title.

b. The Cush-Hook Nation's aboriginal title was not extinguished by treaty.

The principle of aboriginal extinguishment via treaty ratification is unquestionable. Generally, removal treaties, if stated in plain, unambiguous language regarding their Congressional intent, extinguish an Indian nation's claim to aboriginal title. *Santa Fe*. It must, however, be noted that Indian lands have a present possessory interest in their aboriginal lands; the United States, and only the United States, may acquire these lands through dealings with the respective Indian nation. 25 U.S.C. § 177. (Nonintercourse Act of 1834). *See Oneida Indian Nation*, 470 U.S. 226. Respecting aboriginal title, treaties are one method by which extinguishment may occur. Generally, treaties need be ratified by the Senate to be deemed effective. *Bush v. U.S*, 29 Ct. Cl. 144.

In a seminal case involving an Indian nation's claims to aboriginal title, The Supreme Court acknowledged that while dealings with Indian nations may be convoluted, absent a clear Congressional intent to extinguish an Indian nation's claims to aboriginal title,

aboriginal title may not be extinguished. The *Santa Fe* Court declared "the power of Congress …is supreme," regarding "extinguishment of Indian title based on aboriginal possession." 314 U.S. at 347. Since the ruling of the 1941 *Santa Fe* decision, numerous courts have adopted the Court's reasoning.

The Supreme Court further affirmed its decision in *Santa Fe* when deciding *Mille Lacs Band of Chippewa Indians*. 526 U.S. 172. *Minnesota* held that usufructuary rights, were not extinguished through a number of treaties because Congressional intent to abrogate aboriginal rights was absent. *Id.* Within its reasoning, the court further stated that treaty rights are not abolished at the time of statehood, while also highlighting the importance of interpreting statutes liberally, favoring the Indian nation's rights, so long as Constitutional. *Id.*

Furthermore, Indian nations are not without reprise and may be afforded compensation for takings of Indian land with unextinguished claims to aboriginal title. *Alcea Band of Tillamooks*, 329 U.S. 40. First, however, an Indian nation must demonstrate existing claims to aboriginal title. *Id.* Compensation will not be given if payments were accepted by Indian nations, even if treaties with the United States were not ratified. *Wahkiakum Band of Chinook v. Bateman*, 655 F.2d 176 (9th Cir. 1981).

Here, Anson Dart's treaty never extinguished the Cush-Hook's claims to aboriginal title, because the Senate never ratified the treaty between the Cush Hooks and the United States. Additionally, no payments were made to the Cush-Hook Nation for their lands; payments made following treaty negotiations may extinguish a nation's claim to aboriginal title. *Wahkiakum Band of Chinook*, 655 F.2d 176. *See also U.S.* v. Dann, 470 U.S. 39 (1985). Their lands instead remain held under claims to aboriginal title.

Additionally, Anson Dart's treaty with the Cush-Hook Nation failed to demonstrate, in a clear and unambiguous manner, the federal government's intent to extinguish their aboriginal title. *Santa Fe*, 314 U.S. 339. Regardless, the unratified treaty failed to confer any of the promised benefits to the Cush-Hook Nation; most notably, no payments were received by the Nation, enabling the Cush-Hook Nation to receive present day compensation for the taking of their lands. *Alcea*, 329 U.S. 40.

Furthermore, Clark understood the Cush-Hook willing to interact with the United States, and, in essence, recognized. Recognition, if present, provides Indian nations with recognized title, versus aboriginal title. *Tee-Hit-Ton-Indians*, 348 U.S. 272. Generally, recognized title is that which affirms aboriginal title through treaty or statute, although it may demonstrated by "definite intention by congressional action or authority to accord legal rights, not merely permissive occupancy." *Id.* at 278–79. Though not federally recognized, the Cush-Hook were recognized by Clark and may be afforded compensation more readily. Because United States failed to ratify a valid treaty with the Cush-Hook Nation, the Nation's claim to aboriginal title was never extinguished.

B. The Cush-Hook's lands were never transferred to the United States.

In conjunction with the powers vested within the United States Constitution, the Nonintercourse Act of 1834, currently codified as 25 U.S.C. § 177, states "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity." 25 U.S.C. § 177. The Act was extended over Oregon Territory on June 5, 1850, requiring intercourse with Indian nations be subjected to federal jurisdiction. *U.S. v. Bridleman*, 7 F. 894 (D. Or. 1881). Here, the United States never gained proper title to the questioned lands because the Cush-Hook

Nation's claim to aboriginal title was never extinguished by treaty or abandonment, making all subsequent transfers void *ab initio*.

In *Santa Fe*, the Supreme Court reasoned that transferability of Indian lands, subjected to use and occupancy, to third parties, first requires an effective extinguishment of Indian title combined with the fee conveyance to the federal government. This notion was defined within the provisions of Nonintercourse Act of 1834, which focused upon the necessity for fair dealings with Indian nations and the inadequacy of any party but the federal government to conduct said dealings.

Moreover, the *Santa Fe* Court applied the longstanding policy of the United States regarding relationships with Indian nations, respecting their rights to usage and occupancy. Such rights need not be formally recognized through federal recognition, nor be based upon treaty, statute, or other formal governmental actions. *Id*. at 347. Occupancy need be extinguished before any lands transfers may be conducted. *Id*.

The Supreme Court of the United States further commented that "only public lands owned absolutely by the United States are subject to survey and divisions into sections." *Leavenworth at al v. U.S.*, 92 U.S. 733, 741 (1875). The Court noted the importance of Indian lands and the interrelationships between the United States and said Nations. The *Leavenworth* Court refined this principle by quoting *The Cherokee Nation v. Georgia*, 30 U.S. 1 (1831): "Indians are acknowledged to have the unquestionable right right to the lands they occupy, until it shall be extinguished by the voluntary cession to the government." *Id.*

Here, the United States could never have gained, nor transferred fee title to the questioned lands because the United States never extinguished the Cush-Hooks Nation's claims to aboriginal title. *Santa Fe*, 314 U.S. 339. Absent an extinguishment of the Cush-

Hook Nation's claims to the lands, the rights to utilize and occupy the land remained in possession of the Indian Nation and no other party. *Cherokee Nation*, 30 U.S. 1. *See Johnson*, 21 U.S. 543.

Additionally, Congressional intent regarding Indian relations is unquestionable. In an 1855 opinion, then Attorney General Caleb Cushing clearly expressed the United States' beliefs regarding Indians in Oregon Territory, which were transferred, unchanged, to the State of Oregon in 1859. Cushing noted the importance of non-intercourse and fair dealings with the Indian nations of Oregon. 7 U.S. Op. Att'y. Gen. 293 (U.S.A.G.), 1855 WL 2306. Furthermore, Cushing relayed that only the federal government may deal with the Indians and not the Territorial government. Cushing wrote:

> There is one other idea suggested by the Commissioner of Indian Affairs, and the documents he communicates, as being current in Oregon, namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy-title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a white settler has the same right thus to oust the Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and violence for law. *Id.*

Clearly, Cushing writes of the intent of the United States and of the supremacy of the federal government and the Nonintercourse Act of 1834.

Within his opinion, Attorney General Caleb Cushing's beliefs, representing those of the United States, clearly support the Oregon Court of Appeals' finding that Congress erred by declaring all lands within the Oregon Territory as public lands. Both precedent and Cushing's opinion alike support this finding. The Cush-Hook's lands were not public lands at the disposal of United States and the Territory of Oregon, but instead were possessed through aboriginal title.

The proceeding lands transfers need not be discussed in depth because the United States never possessed the lands in fee, and instead had only a future interest in the Cush-Hook's unextinguished possession of the lands. Plainly stated, the Territory of Oregon never gained possession of the lands from the United States. *Johnson*, 21 U.S. 543. Hence, the Meeks could never have been granted the option to possess the land in fee, nor would the State of Oregon ever have gained fee possession of the lands, making the questioned parklands subject to the Cush-Hook Nation's aboriginal title.

Thus, the Oregon Court of Appeals correctly held that Congress erred in the Oregon Donation Land Act while it described all the lands in the Oregon Territory as being public lands of the United States and consequently that the United States' grant of fee simple title to the land at issue to Joe and Elsie Meek under the Oregon Donation Land Act was void *ab initio* and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void. This Court should therefore affirm the decision of the Ninth Circuit.

II. Oregon Does Not Have Criminal Jurisdiction to control the use of, and to protect, archaeological, cultural, and historical objects on the land in question.

Captain was charged with two crimes. The first was trespass on state lands, cutting timber in a state part without a permit. The second was desecrating an archaeological and historical site under Oregon Statutes 358.905-961 and Oregon Statutes 390.235-240.The Circuit Court found that Captain had cut down an archaeologically, culturally, and historically significant tree containing a tribal cultural and religious symbol. Captain was found not guilty for trespass on state lands and cutting the tree down without a permit. The reason for this is because the park was found to still belong to the Cush-Hook which made the land not state land. Captain was found guilty of damaging an archaeological site and

removing a cultural and historical artifact. Captain was fined for $250. The Court found that while the land belongs to the Cush-Hook, the State of Oregon had jurisdiction over tribal lands under Public Law 280.

A. Public Law 280.

As established under the Constitution of the state of Oregon:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment. (Or. Const. Art. I § 11).

The State of Oregon can charge and sentence those who fall under her jurisdiction to any enacted law or statute that is created to further the interests of the state of Oregon. At the same time,

> WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America. (U.S. CONST. pmbl. [capitalized text from the original document]).

The text of the Constitution of the United States indicates and is the supreme law of the land. The state of Oregon can create her own laws but also follows any laws laid out by the Federal Government.

Native American Tribes are separate sovereign entities. As laid out in *Johnson v. M'Intosh*, "the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired," *Johnson v. M'Intosh*, 21 U.S. 543, 547 (1823). "Indian reservations are a part of the territory of the United States," *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (*citing United States v. Rogers*, 45 U.S. 567, 571 (1846)). "Indian tribes are completely under the sovereignty and dominion of the United States, *Id.* Indian Nations and the Reservations that they reside upon are governed only by themselves and the Federal Government making them outside the jurisdiction of the individual States.

In *Worcester v. Georgia*, the Supreme Court stated,

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these facts ... manifestly consider the several INdian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States. 31 U.S. at 557.

This mentality was reiterated 141 years later in *McClanahan v. Arizona State Tax Comm'n* which states, "it followed from this concept of Indian Reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries," (*McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Indian Nations are separate nations dependent upon the Federal Government and are not at the mercy of state law.

The State of Oregon claims that they have criminal jurisdiction over the tribes through Public Law 280. Public Law 280 states:

> Each of the states or territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian Country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory ... Oregon: All Indian Country within the state, except the Warm Springs Reservation.[1] (State Jurisdiction over offenses committed by or against Indians in the Indian Country, 18 U.S.C. § 1162 (a) (2010)).

Public Law 280 was created because "the apparent reason for the enactment of that statute was the need to curtail lawlessness on Indian Reservations," *State v. Smith*, 277 Or. 251, 256, 560 P. 2d 1066 (1977). Public Law 280 was created with the intention to have six specific states (Minnesota, Wisconsin, Nebraska, Alaska, California, and Oregon) hold jurisdiction over Tribal Reservations, *Id.*

a. Public Law 280 does not apply in the State of Oregon in regards to the Cush-Hook Nation's Land.

The land in question is not Tribal Sovereign Land. 18 U.S.C. § 1151 defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and,
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (Indian Country Defined, 18 U.S.C.A. § 1151 (2012)).

Public Law 280 gives states jurisdiction, "over offenses committed by or against Indians in the areas of Indian country listed opposite the names of the State," 18 U.S.C. § 1162 (2010).

1 The other five states included in the table have been omitted

2 "Archaeological object" means an object that:(A) Is at least 75 years old;(B) Is part of the physical record of

The Cush-Hook do not have Reservations of land that were given to them by treaty and the Cush-Hook do not have any allotted land. The Oregon Tax Court stated "an allotment is a 'parcel [] of land created out of a diminished Indian reservation and held in trust *** for the benefit of individual indians,'" *Foreman v. Dept. of Revenue*, 18 Or. Tax. 476 (T.C. 2005) (*citing Alaska v. Native Vill. Of Venetie Tribal Gov't*, 522 US 520, 529 (1998)). The Cush-Hook are however a dependent Indian Community within the borders of the United States but they have not acquired territory that can be considered Cush-Hook reserved land.

Public Law 280 does not apply to the land in question. It is not Indian Country as defined by 18 U.S.C.A. § 1151. Public Law 280 states "jurisdiction over offenses committed by or against Indians in the areas of Indian country," 18 U.S.C. § 1162. Public Law 280 does not apply to bring criminal charges against Captain for events occurring on Kelley Point Park.

B. The State of Oregon does not have the Authority to Control the Use of, and to Protect, Archaeological, Cultural, and Historical Objects on the Land in Question.

Captain was charged with desecrating an archaeological and historical site under Or. Rev. Stat. §§ 358.905-961 and Or. Rev. Stat. §§ 390.235-240. The state of Oregon does not have the ability to charge Captain for anything found in the Kelley Point Park area.

Oregon Statute Or. Rev. Stat. § 358.910 states:

> Archaeological sites are acknowledged to be a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon. As such, archaeological sites and their contents[2] located on public land are under the stewardship of the people of

2 "Archaeological object" means an object that:(A) Is at least 75 years old;(B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and(C) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products. Or. Rev. Stat. Ann. § 358.905(a) (West 2012)

> Oregon to be protected and managed in perpetuity by the state as a public trust. Or. Rev. Stat. § 358.910 (1) (2012).

Or. Rev. Stat. § 358.905(c)(A) (2012) defines archaeological site to mean, "a geographic locality in Oregon that contains archaeological objects[3]." Or. Rev. Stat. § 358.905(1)(j) (2012) defines public lands to mean "any lands owned by the State of Oregon, a city, county, district or municipal or public corporation in Oregon." In *State v. Holloway*, the Court of Appeals defined public land to be, "land owned by a unit of government," *State v. Holloway,* 138 Or. App. 260, 266-267, 908 P. 2d 324 (1995). For land to be considered an archaeological site, it must be public land owned by a unit of government and contain archaeological objects.

The removal of artifacts from private or public land shall be argued separately with public land being first with private land following.

a. Captain did not Remove any Archaeological or Historical Material from Public Land.

Oregon Statute § 390.235 outlines how to remove archaeological or historical material from public lands.

> (1)(a) A person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under Or. Rev. Stat. § 390.235.
>
> (b) Collection of an arrowhead from the surface of public or private land is permitted if collection can be accomplished without the use of any tool.
>
> (c) It is prima facie evidence of a violation of this section if: (A) A person possesses the objects described in paragraph (a) of this subsection;(B) A person possesses any tool that could be used to remove such objects from the ground; and(C) A person does not possess a permit required

3 "Archaeological site" means a geographic locality in Oregon, including but not limited to submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects and the contextual associations of the archaeological objects with: (i) Each other; or (ii) Biotic or geological remains or deposits." Or. Rev. Stat. Ann. § 358.905(c)(A) (West 2012)

> under Or. Rev. Stat. § 390.235. Or. Rev. Stat. Ann. § 358.920(1)(a)-(c) (West 2012).

As stated in the previous argument about aboriginal title. The Kelley Point Park area rightfully belongs to the Cush-Hook Nation. This invalidates section (1)(a) of Or. Rev. Stat. Ann. § 358.235 (West 2012). Oregon Statute § 390.235 states, "a person may not excavate or alter an archaeological site on public land, make an exploratory excavation on public land,[4]" Or. Rev. Stat. Ann. § 390.235(1)(a) (West 2012). The land is not public land owned by a unit of Government of the state of Oregon under *Holloway*, 138 Or. App. 267. The land in question is private land held by the Cush-Hook Nation.

b. Captain did not Remove an Archaeological Object as defined under Oregon Statute 358.920.

To remove an archaeological object from Private Land, Oregon Statute 358.920 states:

> (3)(a) A person may not sell, trade, barter or exchange or offer to sell, trade, barter or exchange any archaeological object unless the person furnishes the purchaser a certificate of origin to accompany the object that is being sold or offered. The certificate shall include:[5]
>
> (B) For objects obtained from private land:(i) A statement that the object is not human remains, a funerary object, sacred object or object of cultural patrimony.(ii) A copy of the written permission of the landowner to acquire the object. Or. Rev. Stat. Ann. § 358.920(3)(a) (West)

In order to a person to be found guilty of removing any archaeological object under Or. Rev. Stat. 358.920 (3)(a) there must be some means of bettering the individual's financial situation. The statute specifically states "a person may not sell, trade, barter, or exchange or offer to sell, trade, barter or exchange," *Id.*

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4 A person may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archaeological site or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department. Or. Rev. Stat. Ann. § 390.235(1)(a) (West 2012)

5 Or. Rev. Stat. Ann. § 358.920 (3)(a)(A) (West 2012) is omitted as it deals solely with objects obtained from public land before October 15, 1983

Captain was not trying to sell, trade, barter, or exchange anything for the sacred totem that he had. Captain had knowledge that vandals were going into Kelley Point Park and stealing the Sacred Totems of the Cush-Hook Nation in order to sell the totems. Captain had taken the totems from the park in order to preserve the totems with the Cush-Hook people themselves. Had the sacred totem been taken to be sold or offered, it would have fit under section (B), Or. Rev. Stat. Ann. §358.920(3)(B) (West 2012). The sacred totems carved into living wood are sacred objects of the Cush-Hook Nation and would require written permission of the landowner to acquire the object. However, as the totem was not taken to be sold but to be returned to the Cush-Hook who are the rightful owners, Captain did not violate Or. Rev. Stat. § 358.920. The State of Oregon does not have the authority to control the sacred totems that Captain had recovered at the Kelley Point Park area.

The Petitioner claims that if this was on private land, Captain still requires a permit from the state or written approval by the owners of the land under either Or. Rev. Stat. Ann. § 358.920(5) (West 2012) (A person may not excavate an archaeological site on privately owned property unless that person has the property owner's written permission) or Or. Rev. Stat. Ann. § 390.235(1)(a) (West 2012) (remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department). This is not good policy for situations where tribal artifacts are in more danger by waiting. At the time the sacred totems were removed from Kelley Point Park by Captain, numerous other totems had already been taken from the park. These totems would not be brought directly to the Cush-Hook. Captain was on private land owed by the Cush-Hook, of whom he is a member. Captain's

membership in the Cush-Hook is better than written permission, he is a member from who the permission stems.

The State of Oregon does not have the ability to control the use of and to protect, archaeological, cultural, and historical objects on the land in question.

Conclusion

For the reasons named above, Thomas Captain respectfully requests that this Court reverse the decision of the Oregon Court of Appeals and order the sacred totems be returned to the Cush-Hook Nation.